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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL MATTHEW XAVERIUS,

Defendant and Appellant.

D055223

(Super. Ct. No. SCN257428)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed in part and reversed in part with directions

Paul Matthew Xaverius entered into a plea agreement, under the terms of which he pled guilty to robbery (Pen. Code,<sup>1</sup> § 211). The agreement included a dismissal of the remaining allegations and a stipulation that Xaverius would receive a suspended five-year prison sentence and be subject to probation on various conditions. Xaverius was sentenced in accordance with the plea agreement.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

On appeal, Xaverius challenges two of the conditions imposed by the court as part of his probation. Specifically, Xaverius challenges the condition that prevents him from associating with anyone in possession of any firearm or weapon and from associating with known members of the "Posole" street gang.

While we will uphold the condition prohibiting association with known Posole gang members, we find the "firearm" condition to be impermissibly vague and remand the case to the trial court to either strike that condition or modify it in accordance with the views expressed in this opinion.

#### STATEMENT OF FACTS

Since this appeal follows a guilty plea, we take the factual background from the probation officer's report.

The offense in this case occurred on November 17, 2007. The victim was walking on the beach in Oceanside when he was approached by two Hispanic males. One of the men brandished a handgun and demanded the victim's wallet. When the victim said he did not have a wallet, the men punched him and took various items of personal property from him.

DNA analysis of beer cans, which the men had been carrying, led to the identification of Xaverius as a suspect in the robbery. When he was arrested in January 2009, Xaverius admitted he had robbed people on the beach in the past, but stated he did not recall this particular incident.

## DISCUSSION

The probation officer's report for the sentencing hearing recommended a number of conditions of probation. Among the proposed conditions were a number of "gang conditions." Defense counsel objected to all of the gang conditions and the trial court struck all of the conditions except for the two at issue in this case. The challenged conditions are: "12(b). Not knowingly associate with any known gang member or persons who are associated with the Posole gang," and "12(f). Not knowingly associate with any persons who have firearms or weapons in their possession."

Xaverius contends that both conditions are unreasonable. He argues the "weapons" condition 12(f) is unconstitutionally overbroad because it does not provide fair notice of the prohibited conduct and would conceivably place him at risk of violation for otherwise lawful conduct. Xaverius also contends condition 12(b), prohibiting association with members of the "Posole" gang, is unrelated to the criminal conduct in this case and thus unnecessary for his rehabilitation.

We agree that the weapon condition is constitutionally overbroad. On remand the trial court must either strike the condition or cast it more narrowly to prohibit identifiable conduct in a manner that will promote rehabilitation without putting Xaverius at risk of being found in violation of probation for actions, which are not clearly defined. On the other hand, we believe the Posole gang association condition does have a reasonable relationship to the need to prevent Xaverius from further criminal conduct.

### A. Legal Principles

A trial court, which grants probation, may impose reasonable conditions that are "generally and specifically for the reformation and rehabilitation of the probationer." (§ 1203.1, subd. (j).) A condition of probation that restricts freedom of association must be sufficiently precise for the probationer to know what is required of the person and to permit the court to know whether the condition has been violated. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Restrictions on freedom should be closely tailored to the purpose of the grant of probation. (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641.) The reasonableness of the condition must be considered in its context as it is relevant to the facts of the offense and the need to prevent the defendant from future criminal conduct. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

### B. The Weapons Condition

Condition 12(f) requires that Xaverius not knowingly associate with any persons who have firearms or weapons in their possession. We first note the condition does not distinguish between persons who are in legal and illegal possession of weapons or firearms. Certainly knowledge of illegal possession of such items would limit the scope of the condition. However, as presently phrased, the probationer is not placed on notice of what constitutes a weapon. Further, even association with persons, such as law enforcement officers or security officers could be a violation of the terms of probation.

The condition is particularly vulnerable in its failure to define what constitutes a weapon. It is understandable that a "gang condition" might try to prevent involvement in violent gang activity by restricting the probationer's association. As currently phrased, it

is difficult to define the full range of "weapons" that are encompassed by the condition. Persons working in kitchens use knives that can certainly be used as weapons. People working in construction trades regularly use implements that, depending on their use, could well be weapons.

The Attorney General acknowledges that there is a vast array of items that could be classified as weapons and argues the condition is still valid because one should focus on the intentions of the possessor of the weapon. Thus it is argued the condition, as interpreted, would not prevent Xaverius from associating with people who possess potential weapons, but intend to use them lawfully. Whether or not the condition, as modified by the Attorney General might be valid, that is not the condition imposed by the court. In its present form condition 12(f) is impermissibly vague and thus unconstitutional. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 891-892.)

### C. The Posole Gang Condition

Probation condition 12(b) requires that Xaverius not associate with known members of the Posole gang. He contends the condition is not related to the crime in this case nor is it appropriate for his rehabilitation. The parties agree there is no evidence that this crime was gang related. However, they dispute the relevance of the prohibition to the need to deter Xaverius from future criminal conduct.

We agree there is no evidence that the current offense was gang related. There is, however, evidence in the record to support the condition. The probation report shows that Xaverius, who has a significant criminal history, has been affiliated with the Posole gang in the past. He also has a tattoo that reads "STR8LOCO," which would appear to be

a gang tattoo. Defense counsel informed the court Xaverius had not had contact with gang members "for years." His counsel also expressed the concern the limitation could restrict contact with family members who "may have" connections with the gang.

Taken together, there are enough facts in the record to show that Xaverius has had, and may still have affiliations with a criminal street gang. Given his record and his admission to police that he had committed numerous robberies of people on the beach, the trial court could reasonably conclude that preventing Xaverius from associating with known gang members would enhance the chances for Xaverius to successfully complete probation. (*People v. Lopez, supra*, 66 Cal.App.4th at pp. 624-626.) We are satisfied that the court acted within its broad discretion to impose a prohibition on associating with known gang members.

#### DISPOSITION

The order imposing condition 12(f) is vacated. The trial court is directed to either strike that condition or modify it in accordance with the views expressed in this opinion. In all other respects the judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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O'ROURKE, J.

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IRION, J.